Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF GRENADA, MISSISSIPPI, *ET AL.*,

Appellants

v.

LOUISE HUBBARD, *ET AL.*,

Appellees

On Appeal from the
United States District Court
For the Southern District of Mississippi

JURISDICTIONAL STATEMENT

T.H. Freeland, III
*T.H. Freeland, IV

Freeland & Freeland Lawyers
Box 268
1013 Jackson Avenue
Oxford, Mississippi 38655
(601) 234-3414

*Counsel of Record

Jim McRae Criss,
Attorney at Law
2245 South Commerce Street
Grenada, MS 38901
(601) 226-1984

68 pp

QUESTIONS PRESENTED

1. Whether the lower court exceeded its jurisdiction under Section 5 of the Voting Rights Act by ordering enforcement of an improperly precleared redistricting plan.

2. Whether an improperly adopted and improperly precleared redistricting plan can be the basis for a Court-ordered remedy.

3. Whether a Summary Judgment can be used to award mandatory injunctive relief or to resolve factual issues relating to the award of that relief.

PARTIES

The parties to the proceeding in the United States District Court were:

(1) Louise Hubbard, John Hankins, Pauletta Williams, Stanford Amos, Dora W. Stewart, and Steve Robinson, plaintiffs and appellees herein,

(2) City of Grenada, Mississippi, defendant,

(3) Grenada, Mississippi Democratic Executive Committee, defendant, by and through its Chairperson, George Murphy, defendant,

(5) Grenada, Mississippi Republican Executive Commission, by and through its Chairperson, J. M. Ainsworth, defendant, and

(6) Grenada, Mississippi Election Commission, By and Through Its Chairperson Mary Holmes.

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OPINIONS BELOW

The July 1, 1998 opinion of the three-judge United States District Court for the Northern District of Mississippi granting summary judgment to Louise Hubbard and the other plaintiffs is unreported and appears in the Appendix ("App.") at A-10. The November 19, 1997 opinion of the United States district court entering judgment in favor of Louise Hubbard and the other plaintiffs is reported as ***Hubbard v. City of Grenada,*** 990 F.Supp. 478 (N.D. Miss. 1997) and appears at App. A-19. The November 21, 1996 opinion the district court denying the plaintiffs motion for a preliminary injunction is unreported and appears at App. A-25.

JURISDICTION

The final judgment of the court below was entered on July 1, 1998. The City of Grenada and other appellants filed a notice of appeal on July 28, 1998. App. A-8. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, is set forth at App. A-2. Miss. Code Ann. § 21-17-9 (1972) is set forth at App. A-4.

STATEMENT OF THE CASE

A. THE STATE COURT *HARRELSON* LITIGATION

In preparation for the 1996 election, officials of the City of Grenada, Mississippi ("the City") realized that election procedures and districts enacted by the City Council in 1992 were not properly adopted according to state law. ***City of Grenada v. Harrelson,*** ___ So.2d ___ (Miss.), ***reh'g denied,*** ___ So.2d ____ (1998) (App. A-31, 32) ("***Harrelson II***"). Miss. Code Ann. § 21-17-9 (1972) (App. A-4) requires: that any

amendment to a city charter be published for three weeks in the local newspaper; and that the citizenry be given an opportunity for petition, with petition by 10% or more of the electorate resulting in a referendum on the proposed district lines. ***Harrelson II***, ___ So.2d at ____ (App.-32). These steps were not followed. ***Id.***

On December, 22, 1995, looking toward the April, 1996 elections, the City filed a complaint in the Circuit Court of Grenada County, Mississippi, seeking a ruling: that the 1991 wardlines had not been legally adopted; that the prior wardlines (from 1986) did not comply with federal and state law, specifically the standard of one-man, one-vote; and that the upcoming election could not proceed under the 1991 wardlines without violating Miss. Cod Ann. § 21-17-9 (1972)(App. A-4). ***Harrelson II***, ___ So.2d at ____ (App. A-31-32).

The State Circuit Court held two hearings in January, 1996 and a third on March 29, 1996. ***Harrelson II***, ___ So.2d at ____ (App. A-32). By that time, the City had attempted to re-adopt the 1991 wardlines following state law, but had not succeeded. ***Harrelson II***, ___ So.2d at ____ (App. A-33).[1]

The state Circuit Court ruled at the March 29, 1996 hearing that the 1991 wardlines were not properly adopted, but that it had no authority to stay or enjoin the April, 1996 election. Further, although it was undisputed that the wardlines from 1986 violated the principle of one-man, one-vote, the

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[1] The City Council readopted the 1991 wardlines in January, 1996, and thereafter advertised in compliance with Miss. Code Ann. § 21-17-9 (1972) (App. A-4). When sufficient voters petitioned for a referendum on 1991 wardlines, it became clear that the wardlines could not be finally adopted prior to the April, 1996 election. ***See Harrelson II***, ___ So.2d at ____ (App. A-33)(setting forth these facts).

Circuit Court ordered the city to hold the upcoming elections using those lines.[2] The City appealed this ruling.

B. THE FEDERAL COURT *HARRELSON* LITIGATION AND THE MISSISSIPPI SUPREME COURT STAY ORDER

Facing elections in roughly two weeks, the City sought relief by filing ***City of Grenada v. Harrelson*** in the United States District Court for the Northern District of Mississippi, in which the City sought a preliminary injunction staying the election. ***See City of Grenada v. Harrelson*** (N.D. Miss. April 3, 1996) (App. A-29)("***Harrelson I***") (opinion denying preliminary injunction). On April 3, 1996, the district court found that the violations were only those of state law "more properly addressed by the Mississippi Supreme Court." ***Harrelson II***, at 1 (App. A-32).[3] The district court refused to "ground" an "alleged violation" of the Voting Rights Act in "actions that are only violative of state law." ***Id.*** Further, finding that the Mississippi Supreme Court could "remedy any harm it may find" the court refused to find irreparable injury. Finding a balancing of harms favored neither party, the court refused to issue an injunction.

The day after the district court denied a preliminary injunction, the City sought a stay in the Mississippi Supreme Court in the litigation then pending on appeal from the Circuit

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[2] ***Harrelson II***, ___ So.2d at ___ (App. A-33-34). In ordering the City to return to wardlines from prior to 1991, the state court was also effecting a change in voting practices and procedures.

[3]Language quoted in the text was later quoted by the lower court below as explaining its ***Harrelson I*** ruling. ***See*** Opinion, ***Hubbard v. City of Grenada*** at 1 (N. D. Miss. Nov. 21, 1996)("***Hubbard I***") (App. A-25) (quoting language); ***Hubbard v. City of Grenada***, 990 F.Supp. 478, 479 (N.D. Miss. 1997) ("***Hubbard II***") (App. A-20).

Court of Grenada County. ***See Harrelson II***, ___ So.2d at ____ (App. A-34). On April 6, 1996, the Mississippi Supreme Court entered an order staying the April 9th election. ***Id.*** It is the failure to preclear this order prior to its enforcement that is the central claim asserted in this cause. After the stay had had its effect, the Mississippi Supreme Court lifted it on June 21, 1996. ***Id.***

C. THE *HUBBARD* LITIGATION THROUGH FIFTH CIRCUIT REMAND

On September 3, 1996, Louise Hubbard et al. filed suit against the City alleging failure to preclear the Mississippi Supreme Court order staying the April elections. After suit was filed, the plaintiffs filed a motion for a preliminary injunction and a motion to impanel a three-judge court. The city opposed the former and not the later. Without constituting a three-judge court, the lower court denied the plaintiffs' request for a preliminary injunction to hold an election in its order of November 22, 1996. Opinion, ***Hubbard v. City of Grenada,*** at 4 (N.D. Miss. Nov. 21, 1996)(App. A-25, 28)("***Hubbard I***"). In doing so, the court noted that it had previously denied a stay of the election, refusing to "intercede in a state law question more properly addressed by the Mississippi Supreme Court" and noted that the City had thereafter sought relief in the Mississippi Supreme Court. ***Hubbard I***, at 1 (App. A-25). In the hearing on the preliminary injunction, the City stipulated that the failure to preclear the Mississippi Supreme Court stay order violated Section 5 of the Voting Rights Act. ***Id.*** (App. A-26).

In its response to the plaintiffs' motion for a preliminary injunction, the City asked the court to give it an opportunity to obtain preclearance of a new redistricting plan, that

> includes not only those citizens residing in the city under the 1991 plan but also those who have become citizens of the city under a

> recently approved, though not precleared, annexation.

Id.[4] The court denied the plaintiffs' request for a preliminary injunction, holding that there had been a showing of likelihood of success, but that the other factors required for a preliminary injunction had not been proved. Specifically, the court held that irreparable injury was not shown by a violation of Section 5 standing alone. Further, the court held the following in weighing public interest and balancing of harms:

> [A]lthough the public has a substantial interest in voting and electing representatives of their choice, they also have an interest in having officials who represent all of the electorate, not simply those included in the 1991 plan.

Id. (App. A-27-28). The court also held that the "substantial costs involved in ordering special elections" weighed against providing relief.

The following year, the Hubbard plaintiffs filed a new motion for a preliminary injunction and motion to empanel a three-judge court. The defendants did not contest the motion to empanel a three-judge court. Rather than hold a hearing on the merits, on November 18, 1996, the "Court conducted two telephone conferences with the parties. This opinion memorializes the results of those conferences." Opinion, ***Hubbard v. City of Grenada***, 990 F.Supp. 478, 479 (N.D. Miss., 1997)(App. A-19)("***Hubbard II***"). The court decided

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[4] The city had adopted an annexation ordinance on October 25, 1993. This annexation was approved by the State Chancery Court on January 24, 1995, a decision that was affirmed without opinion by the Mississippi Supreme Court on February 15, 1996. ***See In re Extension of the boundaries of the City of Grenada, Mississippi,*** 669 So. 2d 85 (Miss. 1996) (affirmance of annexation).

the merits of the case, ordering the city to hold a special election, denying the plaintiffs' motions for a three-judge court and preliminary injunction as moot, and dismissing the case. The court had no dispositive motion before it. Ruling that, in denying the plaintiffs' motion for preliminary injunction the previous year, it was

> focusing primarily on the plaintiffs' failure to prove irreparable injury. At that time the court was under the impression that "the defendants [were] well into the preclearance process".

Hubbard II, 990 F.Supp. at 479 (App. A-21). The court noted that the defendants had made a preclearance submission on March 31, 1996, and that preclearance was denied. Quoting the city's status report, the court stated:

> In order to provide a part of the additional information requested by the Department of Justice in connection with the preclearance of the proposed annexation, the City of Grenada contracted with the United States Bureau of the Census for a Special census of the City of Grenada. ... We are now advised that we will have full information within four to six weeks [of September, 1997].

Hubbard II, 990 F.Supp. at 480 (App. A-23)(quoting defendant's status report). Concluding that delays in preclearance were caused by "the defendants' failure to timely respond"[5] the court ordered an election using the 1991 wardlines:

> Although that plan was declared void under state law because of defendants' failure to allow the citizens to object to the ward lines, the plan

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[5] ***Id.*** (App. A-23-24).

> passed preclearance by the Justice Department and was not otherwise challenged as violative of either the Voting Rights Act or the United States Constitution. The court recognizes that this plan omits from participation those citizens who were annexed into the city in 1996 but finds that it cannot further delay the other citizens of Grenada from exercising their right to cast votes for candidates of their choice when neither the annexation nor the proposed redistricting plan has been precleared and defendants have not moved quickly in fulfilling their obligations under Section 5.

Id. at 481 (App. A-24). The court ordered that the City hold a special election under the 1991 plan, with the first primary to be held on February 3, 1998.

The City filed a motion to reconsider the district court order, and a motion for a stay pending reconsideration or appeal. After the motion to reconsider was denied, the city appealed to the Fifth Circuit Court of Appeals. The district court denied a stay pending appeal on January 21, 1998, and the City sought a stay from the Fifth Circuit. A panel of the Fifth Circuit granted a stay of the lower court order pending appeal on January 28, 1998. Thereafter, the parties filed a joint motion to remand to a three-judge court. The Fifth Circuit granted this motion on March 2, 1998. Order Remanding, ***Hubbard v. City of Grenada*** (5th Cir., March 2, 1998)(App. A-18).

D. THE STATE COURT *HARRELSON* OPINION

On March 29, 1998, the Mississippi Supreme Court reversed and remanded in ***Harrelson II***. The question before the court was, given the violations of state law in adoption of the 1991 wardlines, whether the state lower court had the power to enjoin upcoming elections using those wardlines. The Mississippi Supreme Court held that the lower court had erred in taking the view that it had no power to enjoin the election.

Harrelson II, ___ So.2d at ___ (App. A-35, A-38-A-39). In doing so, the Mississippi Supreme Court stated:

> We hold that the Election Commission had an official duty to see to it that the elections in Grenada were carried out in compliance with state law.

Id. at ____ (App. A-39). The election commissioners are officials of the City, and defendants/appellants in this cause.

E. THE RULING BY THE *HUBBARD* THREE-JUDGE COURT

After the remand by the Fifth Circuit, the district court impaneled a three-judge court to hear this case. The plaintiffs then filed a Motion for Summary Judgment, seeking essentially the same relief that had been awarded in the district court's prior ruling.

On July 1, 1998, the three-judge court granted the plaintiffs' motion for summary judgment. The court found that there had been "yet another series of delays in fulfilling Justice Department Requests." The court began by citing the Justice Department's statement that the city "failed in its April [1998] submission to provide adequate and complete information regarding the submitted changes." ***Hubbard v. City of Grenada*** (N.D. Miss. July 1, 1998)(App. A-10, A-11-12)("***Hubbard III***"). The court also noted that Mississippi Supreme Court ruling in ***Harrelson II***, but stated "that opinion...remains subject to withdrawal or modification..." ***Hubbard III***, at 3 n.4 (App. A-13). This is no longer true; on August 20, 1998, the Mississippi Supreme Court denied rehearing in ***Harrelson II***, without modification of the prior opinion.

The court rejected the City's argument that the 1991 wardlines could not be applied because they had not been properly precleared. The court noted that all parties "readily acknowledge that the city did not properly follow state law

procedures in adopting the municipal districts in 1991". ***Hubbard III***, at 4 (App. A-14). Acknowledging that any change had to be precleared, the court stated

> the panel must necessarily assume that defendants did not simply neglect to follow state law procedure but that they were aware of their actions and intentionally misled the Justice Department and the electorate of the City of Grenada and set the plan up for later challenge.

Hubbard III, at 4-5 (App. A-14). There is utterly no support in the record—either in the summary judgment fillings of the plaintiffs or defendants or elsewhere—for this assumption about the facts. Based upon that assumption and its legal conclusion that preclearance did not "depend on compliance with state law procedures," the court took the view that it could disregard the problems with preclearance of the 1991 wardlines. ***Hubbard III***, at 5 (App. A-14).

The court also rejected the City's argument that the remedy sought was not appropriate for summary judgment. Taking the view that "the remedy sought by plaintiffs is neither unusual nor drastic," and that ample time had been provided for filing materials on summary judgment, the court decided that it did not have to hold a hearing to impose the remedy. ***Hubbard III***, at 6(App. A-15).

The court therefore granted summary judgment for the plaintiffs, ordering that the City hold a special election in November, 1998. Order, ***Hubbard v. City of Grenada*** (N.D. Miss. July 1, 1998)(App. A-6). Judgment was entered on July 1, 1998. ***Id.*** The City filed a Notice of Appeal on July 28, 1998. Notice of Appeal, ***Hubbard v. City of Grenada*** (N.D. Miss. July 1, 1998)(App. A-8).

REASONS FOR NOTING PROBABLE JURISDICTION

INTRODUCTION

The court below granted a summary judgment for the City's conceded violation of Section Five of the Voting Rights Act. In doing so, the lower court compelled the City to hold an election on November 3, 1998, using ward lines the City had adopted in 1991. The Section 5 violation that is the basis for this remedy was that the City had obtained a state court stay of a regularly scheduled April, 1996 election. The City had sought the stay after a state circuit court had decided that the City's 1991 wardlines had been adopted without following the requirements of state law. In adopting the 1991 wardlines, the City did not follow the requirements of state law that the wardlines be advertised to the voters of the City of Grenada and that the voters have the opportunity for petition and referendum on those wardlines. Further, it is undisputed that the failure to follow this state law was not disclosed in the City's submission to preclear the 1991 wardlines. This nondisclosure is itself a change—by failing to follow prior state procedures—which means that the 1991 wardlines were not properly precleared under the Voting Rights Act.

In spite of these deficiencies relating to the 1991 wardlines, the lower court has ordered that the City hold an election using those lines. In spite of the lack of effective preclearance of those wardlines, the lower court has ordered that they will be followed.

This Court's Section 5 cases demonstrate that the lower court had no jurisdiction to implement a change in voting procedures that had not been properly precleared. Further, they demonstrate that improperly precleared procedures were inappropriate for a remedy in a case under Section 5 of the Voting Rights Act. The division of labors established by Section 5 between the district courts of covered jurisdictions and the district court of the District of Columbia is a central element of the Voting Rights Act's regulatory system. Plenary review or summary reversal by this Court is necessary to assure

proper compliance with the jurisdictional limitations placed upon the district court by the Voting Rights Act, and to ensure proper enforcement of the act.

1. By ordering enforcement of an improperly precleared redistricting plan, the district court's decision conflicts with the jurisdictional limits Section 5 places on district courts in the covered jurisdictions and conflicts with ***McDaniel v. Sanchez*** and ***United States v. Board of Supervisors of Warren County***.

2. By ordering enforcement of a change in voting procedures that was only partially submitted or was undisclosed at the time of preclearance, the lower court's ruling conflicts with ***McCain v. Lybrand*** and ***Clark v. Roemer***

3. The lower court's ruling conflicts with *Anderson v. Liberty Lobby* and Fed.R.Civ.Pro. 56 by resolving fact issues relating to the remedy imposed in the lower court's summary judgment

1. BY ORDERING INFORCEMENT OF AN IMPROPERLY PRECLEARED REDISTRICTING PLAN, THE DISTRICT COURT'S DECISION CONFLICTS WITH THE JURISDICTIONAL LIMITS SECTION 5 PLACES ON DISTRICT COURTS IN THE COVERED JURISDICTIONS AND CONFLICTS WITH *MCDANIEL V.* SANCHEZ AND *UNITED STATES V. BOARD OF SUPERVISORS OF WARREN COUNTY.*

In ordering an election using wardlines adopted by the City of Grenada in 1991, the lower court ordered the City to use wardlines that had not been properly adopted according to state law. The Mississippi Supreme Court has affirmed a ruling that the 1991 wardlines were not properly adopted. The requirements of state law that the wardlines be advertised to the voters of the City of Grenada and that the voters have the opportunity for petition and referendum on those wardlines were not followed. ***See*** Miss. Code Ann. § 21-17-9 (1972) (App. A-4) (setting forth requirements). Further, it is

undisputed that the failure to follow this state law was not disclosed in the City's submission to preclear under Section 5 of the Voting Rights Act the 1991 wardlines (***Hubbard III***, at 4 (App. A-13)); this nondisclosure is itself a change—by failing to follow prior state procedures—that means that the 1991 wardlines were not properly precleared under the Voting Rights Act.

The lower court attempted to finesse the preclearance problems with the 1991 wardlines by "assum[ing] that defendants...were aware of their actions and intentionally misled the Justice Departments and the electorate... and set the plan up for later challenge." ***Hubbard III,*** at 4-5 (App. A-13-14).[6] The lower court suggested that this "arguably follows" from the claim that the 1991 wardlines were not properly precleared. ***Id.*** at 5 (App. A-14). The lower court then stated that

> [T]he validity of a redistricting plan under Section 5 and federal law does not depend on compliance with state law procedures. ***See Young v. Fordice***, 117 S.Ct. 1228, 1235 (1997); ***City of Lockhart v. United States***, 460 U.S. 125, 132 (1983); ***McDaniel v. Sanchez***, 452 U.S. 130, 152-53 (1981). Under these cases, defendants' omission did not effect the validity of the preclearance of the 1991 plan by the Justice Department.

Id. This holding—which is the essential holding in rejecting the City's argument about the 1991 wardlines—turns these cases on their head. ***McDaniel*** held that preclearance was required for a reapportionment plan submitted by the covered jurisdiction in response to a court order. The passage the lower court cites begins with legislative history-- that Section 5

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[6] There is no basis in the record or in fact for this assumption.

"automatically requir[es] 'review of *all* voting changes prior to implementation..." The covered jurisdiction in ***McDaniel*** suggested that because a court proceeding limited its choices and because it was not reapportioning as required by state law, the plan it proposed was not a change that required preclearance. ***McDaniel***, 452 U.S. at152-153. It is this language that the court below seized upon in justifying its result in this case. The district court ignores the central point of ***McDaniel***- that even court-ordered remedies must be precleared where they originate in choices of the covered jurisdiction. Furthermore, ***McDaniel*** requires that all changes must be precleared without regard to the covered jurisdiction's intent.

The district court's reliance on ***Lockhart*** is equally telling. ***Lockhart*** held that the question for comparison for Section 5 purposes is between the existing procedures (whether in accord with all state law or not) and the new procedures. ***Lockhart***, 460 U.S. at 132. **The question in *Lockhart* is the precise question that Section 5 explicitly reserves to the District Court of the District of Columbia**—whether preclearance should be allowed. The lower court is jurisdictionally barred from making the comparison suggested by its citation to ***Lockhart***..

This district court's holding is an invert of the view of Section 5 expressed in ***Lockhart***. The covered jurisdiction there attempted to persuade this Court to take a narrow view of what constitutes a "change," arguing that those election procedures that remain in place are not part of the comparison for resolving whether there should be preclearance. This Court rejected that argument, holding that the impact of the change "cannot be determined in isolation from the 'pre-existing elements'...." ***Lockhart***, 460 U.S. at 131.

Lockhart then goes on to hold that the question for comparison is "the system actually in effect...regardless of what state law might have required." ***Id.*** at 132. The district court's mistaken reliance on this language is similar to its

reliance on ***Young v. Fordice***. The question in ***Young*** was whether preclearance of a plan that was never implemented became part of the "baseline" for determining whether a later enactment was a change requiring preclearance. ***Young*** involved the "motor voter" registration laws. The state had passed a provisional plan, which was precleared; when it became clear that the legislature would not pass legislation necessary to implement the provisional plan, the state abandoned it and adopted a new plan. The question was whether the baseline consisted of the provisional plan, which had never been implemented, or the existing law, which had never been changed. Obviously, the court was to look to the law that was actually in effect, and not to law that had been only partly adopted and not put into effect.

Here, there is no dispute that Miss Code Ann. § 21-17-9 (1972)(App. A-4) was in effect at the time of the adoption of the 1991 wardlines. This Court's holdings in ***Lockhart*** and ***Young*** that unenforced laws are not part of the "baseline" for preclearance purposes does not support the district court's holding in this case. Simply stating the lower court's holding highlights its absurdity: The lower court suggests that preclearance "does not depend on compliance with state law procedures." Yet preclearance **is about changes in state law procedures.**

This Court's reversal in ***United States v. Board of Supervisors of Warren County***, 429 U.S. 642 (1977), demonstrates that the lower court could not use the rubric of "remedy" to avoid the jurisdictional limits imposed by Section 5. This Court emphasized the limited role of the three-judge courts in the covered jurisdiction when presented with Section 5 questions: They have no power to evaluate the question whether a change is entitled to Section 5 preclearance, and only the power to decided the question of coverage. In deciding that the prior plan did not comply with the Fifteenth Amendment, and in ruling that the second plan did not dilute minority voting strength, the three-judge court in ***Warren County***

> twice exceeded the permissible scope of its § 5 inquiry. ... It should have determined only whether Warren County could be enjoined from holding elections under a new plan because such plan had not been precleared. under §5.

Id. at 646. This Court in ***Warren County*** expressed its ruling in terms of jurisdiction, holding that Section 5 limited the three-judge court's power to work a remedy for the Section 5 violation, and holding that the three-judge court violated that limitation twice: First, it ruled on Fifteenth Amendment issues in enjoining the unprecleared procedures; Second, it ruled on the issues embodied in Section 5's preclearance test in choosing a plan and did not leave those issues to be determined in the proper forum. The lower court's ruling in this case runs afoul of both hazards-- it passed on the constitutional propriety of the 1991 redistricting plan in ordering that an election be conducted using that plan and it ordered an immediate election without proper preclearance of the 1991 wardlines. This reaches an issue outside the power of a three-judge court and expressly assigned elsewhere by the terms of Section 5. This Court later reaffirmed these lessons from ***Warren County***, stating that the case had held

> it was error for the District Court to determine the constitutional validity of the county's plan and to order it be implemented, rather than limiting its inquiry in the § 5 suit to the question whether the county had complied with § 5.

McDaniel v. Sanchez, 452 U.S. 130, 151 n. 31. The order for an immediate election under the 1991 plan makes this precise error.

The lower court exceeded the strict jurisdictional limits placed upon it by Section 5. The lower court enforced the City's prior (but not properly precleared) wardlines, thereby enforcing a change the City made that had not been precleared. The reversal in ***Warren County*** makes this error clear.

2. By ordering enforcement of a change in voting procedures that was only partially submitted or was undisclosed at the time of preclearance, the lower court's ruling conflicts with *McCain v. Lybrand* and *Clark v. Roemer*.

In passing the 1991 wardlines, it is clear that the City did not follow the existing statutory requirements for enacting wardlines. This failure to follow these procedures itself had a large impact on voting: The statute the City did not follow contains a provision that, upon protest by 10% or more of the voters, the City must hold a referendum on the new wardlines. None of these variations from prior procedure (that is, none of these changes) were disclosed in the City's preclearance submission for the 1991 wardlines. The plaintiffs' requested relief, by seeking enforcement of the wardlines the City adopted in 1991, raises the question of whether the preclearance of those wardlines was effective in light of the failure to disclose or have preclearance of the change in procedure for adopting wardlines.

It is clear that an unsubmitted or undisclosed change is not precleared even when it is a necessary or implied part of a prior, precleared submission. In ***McCain v. Lybrand***, 465 U.S. 236 (1984), the question was whether 1966 changes to an election practice were precleared by a 1971 submission that referred to the 1966 changes (even including them in responses to requests by the Attorney General for additional information). This Court rejected the state's argument that the 1971 preclearance served to ratify or otherwise preclear the 1966 change. This Court noted that the Attorney General's response to submissions place covered jurisdictions "on notice that a preclearance is limited to the changes which a covered jurisdiction has identified by its submission." ***McCain***, 465 U.S. at 252 n. 21. Justice Department regulations required submission of a copy of the change itself and copies of "any other changes in law...relating to the subject matter of the submitted change" and call for reference to the prior

submission if there was one. ***Id.*** at 255 n. 26. This Court ruled:

> To the extent there was any ambiguity in the scope of the preclearance request, the structure and purpose of the preclearance requirement plainly counsel against resolving such ambiguities in favor of the submitting jurisdiction in the circumstances of this case. The preclearance process is by design a stringent one....

McCain, 465 U.S. at 257. This Court therefore refused to accept the notion of a "ratification" or an implied preclearance of a prior, unprecleared change.

In rejecting "ratification," the ***McCain*** court rejected as an effective preclearance something quite similar to what occurred with the 1991 redistricting: In this case, the City adopted a change and sought to have that change precleared. In so doing, the City failed to disclose another change--failure to follow existing state law--that was related and an essential part of the 1991 redistricting. ***McCain*** holds that no "implied" preclearance or "ratification" can occur of the non-disclosed part of the changes.

In ***Clark v. Roemer***, 500 U.S. 646 (1991), this Court applied ***McCain*** to hold that a submission that does not explicitly identify changes sought to be precleared does not accord preclearance of those changes:

> "A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices." 465 U.S. at 256-257, 79 L.Ed. 2d 271, 104 S. Ct. 1037. ...

> The requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under §5.

Clark, 500 U.S. at 658 (quoting ***McCain***, 465 U.S. at 256-57). This Court stated that a preclearance submission must explicitly identify prior changes that were not precleared; otherwise it is incomplete. The City did not inform the Attorney General in its preclearance submission that it had failed to follow existing procedures of state law when it submitted the 1991 ward lines for preclearance. Failure to follow the state law procedures for the adoption of new wardlines is itself a change in voting procedures requiring Section 5 preclearance.

McDaniel v. Sanchez, 452 U.S at 152 made unambiguously clear that the City's role in the 1991 changes requires preclearance of any effort by the lower court to use those changes. ***McDaniel*** held that a plan prepared by a covered jurisdiction and submitted by a court must be precleared "no matter what constraints have limited the choices available to them". In other words, "all voting changes" must be precleared where they involve choices that had been made by the covered jurisdiction, including those made under court orders or supervision. ***McDaniel***, 452 U.S at 151-52.

It is clear that the 1991 preclearance submission is defective and did not serve to achieve preclearance of the 1991 wardlines. The City has not had those wardlines precleared and cannot enforce them.

3.THE LOWER COURT'S RULING CONFLICTS WITH *ANDERSON V. LIBERTY LOBBY* AND FED.R.CIV.PRO. 56 BY RESOLVING FACT ISSUES RELATING TO THE REMEDY IMPOSED IN THE LOWER COURT'S SUMMARY JUDGMENT

In resolving that it is "well familiar with the factual complexities of this case and does not need or desire to hear anything further in that regard", ***Hubbard III***, at 6 (App. A-36), the lower court also arrived at conclusions on a number of

issues of fact. The plaintiffs in their summary judgment motion made conclusory statements (unsupported by affidavit) concerning possible invidious intent on th part of the City officials. The lower court accepted those conclusions, and rejected the facts advanced by the City in support of its assertions as to why delays in preclearance had occurred. ***See Id.*** (rejecting City's factual explanations). In doing so, the lower court accepted the plaintiffs conclusions as to facts and rejected the facts advanced by the defendants. One unresolved question presented by this appeal is whether the lower court could properly resolve issues of fact in entering into a summary judgment on the question of proper relief.

The question in resolving a summary judgment motion is "whether there is a genuine issue for trial." ***Anderson v. Liberty Lobby***, 477 U.S. 242, 249 (1986). In ***Anderson***, this Court held that "the inquiry... is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may be resolved in favor of either party." ***Anderson***, 477 U.S. at 250.

Here the issues for trial relate to remedies and the reasons stated by the lower court for imposing the particular mandatory injunction that was imposed. The trial court's attempt to resolve issues of intent (in its supposition that the City intentionally failed to properly preclear the 1991 wardlines) and issues about the reasons for delays in the preclearance process (which formed an important part of the basis for the remedy it imposed) both disregard "genuine issue[s] for trial" and the standard expressed in ***Anderson***.

The question presented on this issue is one of the interaction of Fed.R.Civ.Pro. 56 and mandatory injunctions: Is it appropriate, particularly where there are fact issues as to the conduct that called for relief, for a lower court to use the summary judgment procedure to enter a mandatory injunction?

The simplest and most clearly available relief for a Section 5 violation is an injunction against the unprecleared

change. ***Clark v. Roemer,*** 500 U.S. 646 (1991). Beyond this, the three judge panel "has some limited discretion in fashioning a remedy." ***United States v. City of Monroe Georgia***, 962 F.Supp. 1501, 1520 n. 21 (M.D. Ga.), ***rev'd on other grounds***, ___ U.S. ___, 118 S.Ct. 400, 139 L.Ed.2d 339 (1997); ***Brooks v. State Board of Elections***, 775 F.Supp. 1470, 1482 (S.D. Ga. 1989) ("the Supreme Court has indicated that the three-judge court has some limited discretion in fashioning a remedy....").

This discretion is "limited" by the nature of the division of labors in Section 5: Congress clearly intended that the work of preclearance be handled solely by three judge courts convened in the District of Columbia. The only statutory role for courts elsewhere is to prevent the enforcement of unprecleared practices. The "limited discretion" referred to is a discretion to afford relief related (and limited) to that enforcement power.

Thus, in ***Allen v. Board of Elections,*** 393 U.S. 544, 572 (1969), an appeal from a Mississippi three-judge court dealing with the issue of whether election changes had been precleared under Section 5, this Court ordered "only prospective effect to our decision, bearing in mind that our judgment today does not end the matter as far as these States are concerned. They remain subject to the continuing strictures of § 5 until they obtain [preclearance]..."

CONCLUSION

By imposing an election using a redistricting plan that was precleared without disclosure to the Justice Department of failures to follow state law (and therefore without disclosure of changes in procedure), the lower court reached outside the limits placed on its jurisdiction by Section 5. The lower court had no power to pass upon the propriety of or impose the 1991 wardlines on the City. Further, by imposing a remedy through summary judgment in spite of the fact that there are fact issues relating to the grounds for imposing the remedy, the lower court erred. This Court should note probable jurisdiction or

summarily reverse and hold that the District Court had no power to either order an election using the 1991 wardlines, and no power to grant relief via summary judgment where there a fact issues relating to the relief granted.

Respectfully submitted this the 28th day of September, 1998.

T.H. Freeland, III
*T.H. Freeland, IV

Freeland & Freeland Lawyers
Box 268
1013 Jackson Avenue
Oxford, Mississippi 38655
(601) 234-3414

*Counsel of Record

Jim McRae Criss,
Attorney at Law
2245 South Commerce Street
Grenada, MS 38901
(601) 226-1984

jurisdictional

Appendices

42 U.S.C. § 1973c A-2

Miss. Code Ann. § 21-17-9 (1972) A-4

Order and Final Judgment, ***Hubbard v. City of Grenada*** (N.D. Miss., July 1, 1998) A-6

Notice of Appeal, ***Hubbard v. City of Grenada*** (N.D. Miss., July 28, 1998) A-8

Opinion ***Hubbard v. City of Grenada*** (N.D. Miss., July 1, 1998) ("***Hubbard III***") A-10

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Opinion, ***Hubbard v. City of Grenada***, 990 F.Supp. 478 (N.D. Miss. Nov. 19, 1997) ("***Hubbard II***") A-19

Opinion, ***Hubbard v. City of Grenada*** (N.D. Miss., Nov. 21nd 1996) ("***Hubbard I***") A-25

Opinion, ***City of Grenada v. Harrelson*** N.D. Miss., April ___, 1996)("***Harrelson I***") A-29

Opinion, ***City of Grenada v. Harrelson*** (Miss. Sup. Ct., March 29, 1998) "***Harrelson II***") A-31

42 U.S.C. § 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of face or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such

qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

Miss. Code Ann. § 21-17-9. Amendment of municipal charter at behest of governing authority.

When a municipality now existing, which has not adopted the code charter or commission form of government, but is governed by another charter, shall desire to amend its charter, the same may be done in this way: the mayor and board of aldermen, city council, or municipal authority, by whatever name known, may prepare, in writing, the desired amendment or amendments and have the same published for three (3) weeks in a legal newspaper published in the municipality, if there be one, and, if none, then by posting for said time in at least three (3) public places therein, after which the proposed amendment or amendments shall be submitted to the Governor, who shall submit the same to the Attorney General for his opinion. The publication of the amendment or amendments may be made as provided in Section 21-17-19. If the Attorney General is of the opinion that the proposed amendment or amendments are consistent with the Constitution and laws of the United States and the Constitution of this state, the Governor shall approve the proposed amendment or amendments. If, after publication is made, one-tenth (1/10) of the qualified electors of the municipality shall protest against the proposed amendments, or any of them, the Governor shall not approve the ones protested against until they shall be submitted to and ratified by a majority of the electors of the municipality voting in a special election. Amendments, when approved by the Governor, shall be recorded, at the expense of the municipality, in the office of the Secretary of State and upon the records of the mayor and board of aldermen, or other governing authorities of the municipality, and when so recorded shall have the force and effect of law. No amendment to the private or special charter of any municipality shall be adopted or approved when such amendment is in conflict with any of the provisions of this title expressly made applicable to municipalities operating under a private or special charter, or is in conflict with the provisions of

any other legislation expressly made applicable to any such municipality.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

LOUISE HUBBARD, et al., **PLAINTIFFS**

v. **NO 3:96CV172-S-A**

CITY OF GRENADA, MISSISSIPPI, et al, **DEFENDANTS**

ORDER AND FINAL JUDGMENT

Pursuant to an opinion issued contemporaneously herewith, it is ORDERED:

That plaintiffs' motion for summary judgment is granted;

That defendants shall conduct special municipal elections in the City of Grenada on Tuesday, November 3, 1998.

That defendants shall publish notice of this election in the **The Daily Sentinel Star** for three consecutive weeks beginning Wednesday, July 22, 1998, and post copies of such notice at three public places in the City of Grenada;

That this notice shall contain the following information:

(1) That the date of the election is Tuesday, November 3, 1998.

(2) That the qualifying deadline is Tuesday, September 8, 1998;

(3) That all persons desiring to be candidates must qualify and/or requalify;

(4) That the run-off election will be Tuesday, November 17, 1998;

(5) That elected officials shall take office on Monday, January 4, 1999, and hold office until their successors have been duly elected and installed in office following the next regular municipal election,

That plaintiffs' motion for preliminary injunction is denied as moot;

That this cause is hereby dismissed.

This 1st day of July, 1998.

/s/

UNITED STATES CIRCUIT JUDGE

/s/

UNITED STATES DISTRICT JUDGE

/s/

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

LOUISE HUBBARD, et al., **PLAINTIFFS**

v. **NO 3:96CV172-S-A**

CITY OF GRENADA, MISSISSIPPI, et al, **DEFENDANTS**

NOTICE OF APPEAL

Notice is hereby given that the City of Grenada, Mississippi; Grenada, Mississippi Democratic Executive Committee, By and Through its Chairperson, George Murphy, Grenada, Mississippi Republican Executive Commission, By and Through Its Chairperson, J.M. Ainsworth, and Grenada, Mississippi Election Commission, By and Through its Chairperson, Mary Holmes, all defendants in the above named case, hereby appeal to the Supreme Court of the United States Court, from the "Order And Final Judgment" entered in this action on the 1st day of July, 1998.

This the 28th day of July, 1998.

/s/
T.H. Freeland, IV
Bar No. 5527
One of the Attorneys for the City of Grenada

OF COUNSEL:
FREELAND & FREELAND, LAWYERS
1013 JACKSON AVE
Box 269
OXFORD, MS 38655
(601) 234-3414

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Notice of Appeal to:

Ellis Turnage, Esq.
Post Office Box 216
108 N. Pearman Avenue
Cleveland, MS 38732

Robert McDuff, Esq.
767 North Congress Street
Jackson, MS 39202

This the 28th day of July, 1998.

/s/
T.H. Freeland, IV

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

LOUISE HUBBARD, et al., **PLAINTIFFS**

v. **NO 3:96CV172-S-A**

CITY OF GRENADA, MISSISSIPPI, et al, **DEFENDANTS**

OPINION

This voting rights matter has come before the court[1] on numerous occasions over the last two years in the form of preliminary injunction hearings, status conferences, and conference calls. On each of these occasions, defendants assured the court and plaintiffs that they were moving forward with redistricting plans as quickly as possible. After yet another series of delays in fulfilling Justice Department requests for information and with defendants' stipulation of a Section 5 violation in hand[2], the court became convinced that defendants were continuing in a pattern "of unnecessary delays

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[1] To minimize the confusion, the word "court" as used in this opinion will refer to any proceedings before Chief Judge Senter before the appointment of the three-judge panel, which will be referred to as the "panel."

[2] The history of this case has been recounted on numerous prior occasions. In this panel's view, additional recitation is not necessary. For a concise version of the facts, see Opinion and Order Denying Motions for Three-Judge Court, Ordering Special Elections, and Dismissing Cause which is dated November 19, 1997.

that...prevented the citizens of the City of Grenada form exercising their right to vote in municipal elections." Consequently, the court ordered special city elections to be held in February, 1998. At that time, the court did not believe "the empanelling of a three-judge court [was] necessary" in light of defendants' stipulation of Section 5 liability. Defendants appealed to the United States Court of Appeals for the Fifth Circuit, which stayed the elections. That court later granted the parties' joint motion to remand and for this case to be heard by a three-judge panel, and Chief Judge Politz appointed the present panel to preside over the remainder of the proceedings. Presently before the panel are plaintiffs' motions for summary judgment and for preliminary injunction.

Several events have occurred since the court's last opinion that deserve mention. First, the city, after several more delays, adopted a new redistricting plan and passed an ordinance amending the city charter on December 30, 1997. That ordinance was then advertised in the local newspaper and after the advertising period, submitted to the Mississippi Attorney General " for an opinion as to whether it was consistent with the Constitution and Laws of the United States." On February 18, 1998, the attorney general found that the amendment was consistent with existing law. That same day, Governor Kirk Fordice approved the amendment as required by state law. Finally, on April 16, the city transmitted to the Justice Department its submission seeking preclearance of the 1993 annexation, the 1997 municipal redistricting plan, and the Mississippi Supreme Court stay order.[3] That submission was received by the Justice Department on April 20, thereby beginning the time period for the Section 5 review.

Second, it is clear from a letter dated June 19, 1998, from the Justice Department to counsel for the city that the city failed in its April submission to provide adequate and complete

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[3]Defendants have submitted no explanation for the additional two month delay.

information regarding the submitted changes. Of particular importance are indications that the city sent additional information to the Justice Department on eight separate occasions, as well as the following statements:

> The information provided in your April 20, 1998, submission and response to our 1996 request for additional information was inconsistent and incomplete. For example, although our December 17, 1996, letter requested audiotapes of relevant council meetings, your April 20, 1998, submission contained no tapes, and you indicated in a telephone conversation...that the city did not have copies of any tapes of council meetings pertaining to the above described changes. Our investigation, however, revealed the existence of such tapes in the city clerk's office and, after we relayed this fact to you, on June 17, 1998, the tapes were provided. In addition, you stated in your April...submission...that the only population data provided by the 1997 special census of the city were at the level of enumeration districts; however, Exhibit 60 to your submission indicated that block-level data was available, and a diskette you provided on May 20...appeared to allocate blocks for the city's 1997 special census to the proposed districts. After we pointed out these contradictions...and repeated our request, on June 17...you provided additional block-level data and maps (dated April 20, 1997) that for the first time reflected the boundaries of the 1997 special census blocks. These maps and data for the geographical units underlying the proposed redistricting plan are essential-and the maps and data provided in your April 20, 1998, submission were inadequate-to allow a thorough evaluation and determination of what

was done in developing the annexation and redistricting plan.

Defendants' failure to submit all of the required information restarted the sixty-day review period, which will end August 18, 1998; the Justice Department did state, however, that it would " make every effort to expedite [its] review."

Finally, for whatever relevance it may have, the Mississippi Supreme Court found that the state circuit court did indeed have the power and jurisdiction to enjoin the Grenada municipal elections and reversed and remanded for further proceedings. ***City of Grenada v. Harrelson***, No. 96-CA-00326-SCT, 1998 WL 208791, at *6 (Miss. Apr. 30, 1998).[4]

On this occasion, defendants do not attempt to relitigate their prior stipulation that the Mississippi Supreme Court order enjoining the 1996 elections was a change in practices, procedures, or standards with regard to voting which required preclearance under Section 5 of the Voting Rights Act and indeed do not dispute the propriety of partial summary judgment on that issue. Rather, defendants focus on the appropriate remedy for the Section 5 violation. In their view, the issue is"[w]hether this [panel] has the power to order the relief sought (an election under wardlines the city adopted in 1991), and, if so, whether this [panel] should exercise that power." Specifically, defendants focus on three arguments: (1) that, notwithstanding preclearance by the Justice Department, the 1991 plan was not properly precleared; (2) that the 1991 plan is constitutionally defective; and (3) that the relief sought is not appropriate for summary judgment and is beyond this panel's jurisdiction to award. Although the panel finds none of these arguments persuasive, it will briefly address each.

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[4] To date, that opinion has not been released for publication and remains subject to withdrawal or modification until such time.

With regard to defendants' first argument, the parties readily acknowledge that the city did not properly follow state law procedures in adopting the municipal districts in 1991; indeed, this oversight prompted the original litigation in both state and federal court. In defendants' view, this procedural omission-which involved defendants' failure to publish notice of the new lines in the local newspaper—affects the legality of the preclearance because the submission to the Justice Department "did not disclose that the City had changed (by failing to follow) prior procedures for adopting wardlines." Repeatedly, defendants refer to their omission as a "change in procedure" which should itself have been precleared.

Having carefully considered the matter, the panel finds this argument unpersuasive. It is elementary Section 5 law that any change in procedure with regard to voting must be precleared, but to take defendants' argument to its logical conclusion, the panel must necessarily assume that defendants did not simply neglect to follow state law procedure but that they were aware of their actions and intentionally misled the Justice Department and the electorate of the City of Grenada and set the plan up for later challenge. This is certainly not the conclusion defendants wish the panel to reach but one which arguably follows their insistence that their omission was an unprecleared procedural change. In the end, though, the panel believes that defendants' arguments are misdirected and fail to take into account States Supreme Court precedent which clearly establishes that the validity of a redistricting plan under Section 5 and federal law does not depend on compliance with state law procedures. ***See Young v. Fordice***, 117 S. Ct. 1228, 1235 (1997); ***City of Lockhart v. United States***, 460 U.S. 125, 132 (1983); ***McDaniel v. Sanchez***, 452 U.S. 130, 152-53 (1981). Under these cases, defendants' omission did not affect the validity of the preclearance of the 1991 plan by the Justice Department. To hold otherwise would, as plaintiffs point out, "provide a blueprint for local governmental officials to perpetuate their stays in office through manipulation of the preclearance process."

As to defendants' second argument, the panel finds it equally unpersuasive. In taking the position that the 1991 plan violates the Fourteenth Amendment, defendants focus on alleged mid-decade population shifts in the City of Grenada which form the basis of the 1997 plan presently pending before the Justice Department and which, according to them, "place the 1991 ward-lines out of compliance with the principle of one-man, one-vote." Even accepting as true and correct defendants' calculations, they do not put the constitutionality of the 1991 plan, based as it was on the 1990 census, in question. It is well established that decennial reapportionment is the norm and "clearly meet[s] the minimal requirements for maintaining a reasonably current system of legislative representation." ***Reynolds v. Sims***, 377 U.S. 533, 583-84 (1964). Although a municipality may be at liberty to proceed as the City of Grenada has done in this case, it cannot be allowed to use a special census as a means of delaying elections. If a municipality wishes to subject its citizens to the considerable expense of mid-decade reapportionment, then it should begin that process sufficiently early enough that the electorate is not deprived of their right to timely cast ballots for candidates of their choice, as has occurred in this case. The panel therefore finds that the 1991 plan is not constitutionally defective.

Finally, the panel turns to defendants' third argument—that the relief sought is not appropriate for summary judgment and is beyond this panel's jurisdiction to award. Neither of these positions has merit. First, the question of this panel's jurisdiction is not at issue in light of its previous finding that the 1991 plan was properly precleared. And second, the remedy sought by plaintiffs is neither unusual nor drastic. Defendants have had ample notice of plaintiffs' position with regard to a remedy for the admitted Section 5 violation and ample opportunity to be heard in opposition. Indeed, the court generously extended the time for defendants' response, time which was spent in part submitting preclearance materials to the Justice Department. Anything further is not, in this panel's view, constitutionally required. The panel is well familiar with the factual complexities of this case and does not need or desire

to hear anything further in that regard. As pointed out in the court's November, 1997, opinion, defendants repeatedly assured the court that they were making great progress toward future elections. Those assurances began over two years ago and to day remain unfulfilled. Indeed, as the June, 1998, letter from the Justice Department indicates, defendants have continued in their pattern of delay even after submission of the proposed plan. Interestingly, defendants, while attacking plaintiffs' efforts to proceed with an election under a perfectly legal plan, suggest no alternative remedy; presumably, they wish to maintain the status quo until the Justice Department renders its decision. The time has come, however, to move forward and to allow the citizens of Grenada the opportunity to vote under the only valid plan now in existence. As previously stated in the court's November, 1997, opinion:

> The court recognizes that [the 1991] plan omits from participation those citizens who were annexed into the city in 1996 but finds that it cannot further delay the other citizens of Grenada from exercising their right to cast votes for candidates of their choice when neither the annexation nor the proposed redistricting plan has been precleared and defendants have not moved quickly in fulfilling their obligations under Section 5.

That statement is even more true today than it was seven months ago.

In sum, the panel finds that plaintiffs' motion for summary judgment is well taken. Defendants have stipulated that a Section 5 violation occurred when the Mississippi Supreme Court order enjoining the 1996 municipal elections was not precleared. Furthermore, plaintiffs have shown that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law with regard to their proposed Section 5 remedy, i.e., an immediate election under the 1991 plan. The particulars of this election process will be set forth in the accompanying order. In light of this ruling, the

separately filed motion for preliminary injunction is denied as moot.

An appropriate order and final judgment shall issue.

This 1st day of July, 1998.

/s/

UNITED STATES CIRCUIT JUDGE

/s/

UNITED STATES DISTRICT JUDGE

/s/

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-60029

LOUISE HUBBARD; JOHN HANKINS; PAULETTA WILLIAMS; STANFORD AMOS; DORA W STEWART; STEVE ROBINSON, On behalf of themselves all others similarly situated

Plaintiffs-Appellees

v.

CITY OF GRENADA, MISSISSIPPI; GEORGE MURPHY; J M ANISWORTH; MARY HOLMES

Defendant-Appellants

Appeal from the United States District Court for the Northern District of Mississippi, Oxford

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Before KING, HIGGINBOTHAM, AND DAVIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the joint motion of the parties to remand this case to the District court for the Northern District of Mississippi, Oxford, is granted

IT IS FURTHER ORDERED that the joint request for this case to be heard by a three judge panel at the district court level is granted.

Reported: 990 F.Supp. 478

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

LOUISE HUBBARD, et al., **PLAINTIFFS**

v. **NO 3:96CV172-S-A**

CITY OF GRENADA, MISSISSIPPI, et al, **DEFENDANTS**

OPINION

This voting rights matter has come before the court on numerous occasions over the last eighteen months in the form of preliminary injunction hearings, status conferences, and conference calls. On each of these occasions, defendants assured the court and plaintiffs that they were moving forward with redistricting plans as quickly as possible. To date, those assurances remain unfulfilled, and the court must take matters into its own hands to provide the voters of the City of Grenada an opportunity to cast votes for candidates of their choice. On November 18, 1997, this court conducted two telephone conferences with the parties. This opinion memorializes the results of those conferences.

I.

A short recitation of the history of this controversy follows: Shortly before the April, 1996, primary election for city officials, defendants came before this court on a motion to enjoin the election. ***See City of Grenada v. Harrelson***, No. 3:96CV-S-A (N. D. Miss.). Defendants' request was based on a finding by a state court judge that the city had failed to follow applicable state law when enacting its ward boundaries in 1991.

After hearing argument from the parties, this court refused to issue the injunction, finding that defendants' complaint was merely a request for this court to "intercede in a state law question more properly addressed by the Mississippi Supreme Court." In response, defendants looked to the state supreme court for relief, which was granted in the form of an injunction halting city elections. Thereafter, plaintiffs filed the instant action seeking a determination that the order by the Mississippi Supreme Court was a change in practice, procedures, or standards with regard to voting which required preclearance under Section 5 of the Voting Rights Act and requesting this court to order special elections under the existing ward lines which had been precleared in 1992.

Within a month of the commencement of plaintiff's suit, this court conducted a status conference in both cases to determine what steps had been taken toward resolving this matter. At that time, defendants agreed to dismiss the original action, since it had received, though not from this court, the relief it had sought. The court also learned for the first time that the Mississippi Supreme Court had lifted the injunction but that the parties had been unable to reach any resolution to plaintiffs' complaints. At the conclusion of the conference, the court scheduled a hearing on plaintiffs' motion for preliminary injunction and strongly urged the city to take the necessary steps towards implementing a new ward plan or otherwise to move this matter towards the goal of conducting city elections. The court took no action on plaintiffs' request for a three-judge panel.

In November, 1996, the court conducted a hearing on plaintiffs' motion for injunctive relief. At the outset, the parties stipulated that the April, 1996, order from the Mississippi Supreme Court was indeed a change in practice, procedures, or standards with regard to voting which required Section 5 preclearance. Plaintiffs therefore asked this court to order special elections under the existing city plan, which, as previously noted, was precleared in 1992, as a remedy for what they viewed as a continuing violation of the Voting Rights Act.

In response, defendants argued that the court should take no action at that time since they had submitted to the United States Attorney General a proposed plan which included not only those citizens residing in the city under the 1991 plan but also those who became citizens of the city under an approved, but not precleared, annexation.

After hearing argument, the court concluded that plaintiffs had shown a substantial likelihood of success on the merits. Indeed, the court could reach no other conclusion in light of defendants' stipulation that Section 5 was violated when the 1996 city elections were halted without preclearance. The court found, however, that plaintiffs had not shown any of the remaining three ***Canal*** factors, **focusing primarily on plaintiffs' failure to show irreparable injury. At that time, the court was under the impression that "defendants [were]** well into the preclearance process" and presumed "that defendants [would] diligently comply with any additional instructions or requests which [might] be forthcoming from the Justice Department regarding any of the matters...pending before it."

The court persisted in that view until August, 1997, when plaintiffs filed a second motion for a three-judge panel. In that document, the court learned for the first time that the Justice Department had requested additional information from defendants in December, 1996, regarding the cancellation of the 1996 elections, the 1996 annexation, and the 1996 redistricting plan and that defendants had not complied with the department's instructions. At no time during the next month did defendants respond to plaintiffs' motion or seek to refute plaintiffs' allegations that defendants were not diligently attending to the department's concerns.

In early September, 1997, the court conducted a telephone conference with the parties and directed defendants to submit a status report to the court explaining their delay in responding to the request from the Justice Department. In the meantime, plaintiffs moved for a continuance of the October, 1997, trial setting which this court granted. Defendants

subsequently complied with the court's order, stating, in pertinent part, as follows:

> On March 31, 1996, the City of Grenada submitted for preclearance the annexation. Thus far the Department of Justice has refused to preclear until it is provided with additional information on the impact of the proposed annexation on redistricting. In order to provide a part of the additional information requested by the Department of Justice in connection with the prelcearance of the proposed annexation, the City of Grenada contracted with the United States Bureau of the Census for a Special census of the City of Grenada following annexation...Initially, the City of Grenada was advised that the special census data would be available in the spring of 1997. We are now advised that we will have full information within four to six weeks.

II.

The court need not linger on plaintiffs' unopposed motions to convene a three-judge court. The initial and primary issue for consideration by a three-judge court in this case would be whether the April, 1996, order from the Mississippi Supreme Court constituted a change in practice, procedures, or standards with regard to voting which required Section 5 preclearance. That issue was determined last year when the parties stipulated to that effect, and therefore, in this court's opinion, the empaneling of a three-judge court is not necessary. As plaintiffs agreed during the course of the most recent telephone conference, this court is perfectly capable of fashioning a remedy on its own. Defendants did not oppose that course, and thus, the court moves in that direction.

As outlined in Section I of this opinion, defendants have repeatedly assured the court that they were doing

everything in their power to gain prelearance of a new redistricting plan so that city elections could proceed. After reviewing all of the submission before the court and considering the facts as outlined by both parties and the steps taken by the city toward prelclearance, the court has come to the conclusion that defendants have not diligently worked toward fulfilling their assurances. Defendants knew as early as May, 1996, that the Justice Department considered the postponement of the April, 1996, elections and the annexation of land surrounding the city to be changes requiring Section 5 preclearance. Defendants delayed responding to that finding until the fall of 1996 when they submitted the election postponement, a new redistricting plan, and the annexation for prelearance. In early November, 1996, prior to the last preliminary injunction hearing, the Justice Department advised defendant that it intended to consider the election matter, the redistricting, and the annexation simultaneously but could not proceed until defendants provided "basic information required under...Section 5 procedures to permit...review [of] that change," including maps of the present and proposed redistricting lines and the population statistics by race. Defendants' failure to include, at a minimum, the very maps which are crucial for the department's decision caused an unnecessary and unexcusable delay and casts doubt on the legitimacy of defendants' representations to the court that they were "well into the preclearance process."

Furthermore, as late as August, 1997, defendants had not responded to a second request for additional information made by the Justice Department in December, 1996, requesting, among other things: a statement of the criteria used to develop the proposed plan, a description of the efforts made to secure input from the minority community, population data by race, returns for municipal elections involving minority candidates since 1990, and a map showing the residences of incumbent office holder and qualifying candidates. Although defendants knew in November, 1996, that the department wanted population figures by race, they focus on that request as the continued source of the delay and do not explain why these

other matters were not immediately sent to the Justice Department for consideration. The figures have now been gathered, and the court assumes they have been passed along to the Attorney General. The court can only view defendants' failure to timely respond to the December, 1996, request as yet another in a series of unnecessary delays that have prevented the citizens of the City of Grenada from exercising their right to vote in municipal elections.

The court now stands ready to correct that situation by ordering city elections under the precleared 1991 plan. Although that plan was declared void under state law because of defendants' failure to allow the citizens to object to the ward lines, the plan passed preclearance by the Justice Department and was not otherwise challenged as violative of either the Voting Rights Act or the United States Constitution. The court recognizes that this plan omits from participation those citizens who were annexed into the city in 1996 but finds that it cannot further delay the other citizens of Grenada from exercising their right to cast votes for candidates of their choice when neither the annexation nor the proposed redistricting plan has been precleared and defendants have not moved quickly in fulfilling their obligations under Section 5. The particulars of this process will be set forth in the accompanying order.

This 19th day of November, 1997.

/s/

CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

LOUISE HUBBARD, et al., **PLAINTIFFS**

v. **NO. 3:96CV172-S-A**

CITY OF GRENADA, MISSISSIPPI, et al., **DEFENDANTS**

OPINION

This cause is before the court on plaintiffs' motion for a preliminary injunction. On this day, the court heard argument on this matter for the third time. On the first occasion, defendants requested that this court enjoin the April, 1996, primary elections for city officials. That request was based on a finding by a state court judge that the city had failed to follow applicable state law when enacting its ward boundaries in 1991. **See City of Grenada v. Harrelson**, No. 3:96CV65-S-A (N.D. Miss). This court refused, finding that defendants' complaint was merely a request for this court to "intercede in a state law question more properly addressed by the Mississippi Supreme Court." Defendants subsequently looked in that direction for relief, which was granted in the form of an injunction halting city elections, and plaintiffs, in response, filed the instant action seeking a determination that the order by the Mississippi Supreme Court was a change in practice, procedures, or standards with regard to voting which required preclearance under Section 5 of the Voting Rights Act.

On the second occasion, the parties came before the court for a status conference on both cases to determine what

steps had been taken toward resolving this matter. At that time, defendants agreed to dismiss the original action, since it had received, although not from this court, the relief it had sought. The court also learned that the Mississippi Supreme Court had lifted the injunction previously imposed, but that the parties had been unable to reach any resolution to plaintiffs' complaints. At the conclusion of the conference, the court strongly urged the city to take the necessary steps towards implementing a new ward plan or otherwise to move this matter towards the goal of conducting city elections.

On this the third occasion, the parties stipulated that the April, 1996, order from the Mississippi Supreme Court was indeed a change in practice, procedures, or standards with regard to voting which required § 5 preclearance. Plaintiffs therefore ask this court to order special elections under the existing city plan, which was precleared in 1992, as a remedy for what they view as a continuing violation of the Voting Rights Act. Defendants argue that the court should take no action at this time since they have submitted to the United States Attorney General a proposed plan which includes not only those citizens residing in the city under the 1991 plan but also those who have become citizens of the city under a recently approved, though not precleared, annexation.

In determining whether the issuance of an injunction is appropriate, the court, of course, looks to the factors outlined in **Canal Authority v. Callaway,** 489 F.2d 567 (5th Cir. 1975). To prevail in their request for the extraordinary relief of an injunction, plaintiffs must convince the court (1) that there is a substantial likelihood that they will prevail on the merits, (2) that there is a substantial threat that they will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to them outweighs the threatened harm the injunction may do to defendants, and (4) that granting the preliminary injunction will not disserve the public interest. **Canal Authority,** 489 F.2d at 572. If plaintiffs fail to meet any one of these factors, then the court should not issue the injunction.

Turning to the first factor, the court is of the opinion that plaintiffs have shown a substantial likelihood of success on the merits. Indeed, defendants have essentially stipulated that a violation of § 5 occurred with the issuance of the injunction by the Mississippi Supreme Court. It is with the second factor, however, that plaintiffs encounter a hurdle. Although they would probably maintain that citizens subjected to a § 5 violation always suffer irreparable harm, they would not prevail in that argument, as it has been rejected by the Fifth Circuit in **Chisom v. Roemer**, 853 F.2d 1186 (5th Cir. 1988), a § 2 case. In that case, the court found that irreparable injury is not automatically established merely upon showing that the challenged electoral standard, practice, or procedure violates the Voting Rights Act; rather, only when the threatened harm would impair the court's ability to grant an effective remedy is there a need for preliminary injunctive relief. **Chisom**, 853 F.2d at 1188, **rev'd on other grounds, Chisom v. Romer,** 504 U.S. 380 (1991). This court believes that holding is equally applicable in this case, particularly under the circumstances presented here where defendants are well into the preclearance process. That situation permits the court the flexibility it needs to find that it will be able to grant an effective remedy later after the preclearance process has concluded. This presumes, of course, that defendants will diligently comply with any additional instructions or requests, which may be forthcoming from the Justice Department regarding any of the matters now pending before it.

As to the third and fourth factors, the court does not believe that any threatened injury to plaintiffs outweighs the harm an injunction might do to defendants, and it finds that granting the injunction at this time would disserve the public interest. This court, of course, does not take voting rights matters lightly, but it cannot discount the substantial costs involved in ordering special elections, especially in the instant situation where defendants have submitted a plan for preclearnce and that process could be concluded before any election might be held under the existing plan. And although the public has a substantial interest in voting and electing

representatives of their choice, they also have an interest in having officials who represent all of the electorate, not simply those included in the 1991 plan.

Therefore, having carefully considered the evidence, the argument of counsel, and the applicable case law, the court is of the opinion that plaintiffs' motion for preliminary injunction is not well taken and is denied. An appropriate order shall issue.

This the 21st day of November, 1996

/s/

CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CITY OF GRENADA
Plaintiff,

v. **NO. 3:96CV65-B-A**

VANNIE HARRELSON, IRENE WILLIAMS AND WILLIE WILLIAMS IN THEIR CAPACITY AS THE CITY OF GRENADA ELECTION COMMISSION AND VALLERIA BLAYLOCK IN HER CAPACITY AS CITY CLERK OF CITY OF GRENADA, MISSISSIPPI,

Defendants.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

On this date, this cause came before the court for a hearing on plaintiff's motion for preliminary injunction, seeking to enjoin the municipal elections scheduled for April 8, 1996. Having carefully considered the testimony and documents presented, the argument of counsel, and the applicable case law, the court finds the motion is not well taken.

A preliminary injunction is considered extraordinary relief, and a determination as to whether a set of circumstances warrants such relief rests in the discretion of the district court. **Canal Authority of State of Florida v. Callaway,** 489 F.2d 567, 572 (5th Cir. 1974). The Fifth Circuit has limited the Court's discretion, however, in setting forth four prerequisites for the issuance of a preliminary injunction Id. These elements are: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the

injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest. Id.

The court finds that plaintiffs have failed to carry their burden of persuasion on the Canal factors. With regard to the likelihood that plaintiffs will succeed on the merits, a fundamental tenet of this nation's Constitutional structure is that a United States court not violate the mandates of Federalism. Reduced to its core, the basis of the instant action is the plaintiff's request that the court intercede in a state law question more properly addressed by the Mississippi Supreme Court. To find an infraction of the Voting Rights Act, the court must ground this alleged violation in actions that are only violative of state law. This is a leap that the court cannot take.

Secondly, there is no danger of irreparable harm in this instance. The Mississippi Supreme Court has the authority to issue a writ of prohibition and thereby enjoin the election. Alternatively, after the election, the Justices could mandate redistricting and order the holding of a special election. Under either scenario, the Mississippi Supreme Court could remedy any harm it may find has (or will) have occurred.

Thirdly, the court finds that a balancing of the harms favors neither party. The harm is equally applicable to all citizens of Grenada and there is no clear distinction to be made as to any particular group.

Lastly, in regard to the public interest, the public voted under the current plan in 1992, and these constituents have a reasonable expectation of voting pursuant to this plan again in 1996. The city of Grenada did nothing to dissuade the voters of this justified expectation until recently.

For these reasons and those stated from the bench, it is ORDERED:

That plaintiff's motion for preliminary injunction is denied.

SO ORDERED this 3rd day of April, 1996.

/s/
CHIEF JUDGE

IN THE SUPREME COURT OF MISSISSIPPI

NO. 96-CA-00326-SCT

CITY OF GRENADA, MISSISSIPPI

v.

VANNIE HARRELSON, IRENE WILLIAMS AND WILLIE WILLIAMS IN THEIR CAPACITY AS THE CITY OF GRENADA ELECTION COMMISSION; VALLERIA BLAYLOCK IN HER CAPACITY AS CITY CLERK OF CITY OF GRENADA, MISSISSIPPI, AND THE "INTERVENORS" LOUISE HUBBARD, JOHN HANKINS, PAULETTA WILLIAMS, STANFORD AMOS, DORA W. STEWART AND STEVE ROBINSON

DATE OF JUDGMENT: 03/29/96

TRIAL JUDGE: HON. C. E. MORGAN, III

COURT FROM WHICH APPEALED: GRENADA COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT: JIM M. CRISS JERRY L. MILLS

ATTORNEY FOR APPELLEES: ELLIS TURNAGE

NATURE OF THE CASE: CIVIL - OTHER

DISPOSITION: REVERSED AND REMANDED - 4/30/98

BEFORE PITTMAN, P.J., McRAE AND ROBERTS, JJ.

PITTMAN, PRESIDING JUSTICE, FOR THE COURT:

The City of Grenada (hereinafter "the City") is a special charter municipality. The City Charter provides for the election of 7 city councilmen from wards described in Section 4 of the Charter. Elections for mayor and aldermen were to take place on the first Monday of May, 1996. Qualification for and participation in those elections was to open on January 2, 1996 and close on March 9, 1996. Primary elections were to be held

on April 18, 1996. In preparation for the election, the City determined that the election procedures and election districts adopted by the City Council in 1992 were not properly adopted. Under Miss. Code Ann. § 21-17-9 (1990) any amendment to a City's Charter must be published for three weeks in a newspaper or posted in three public places for that length of time to give notice to the public of the amendment. Thereafter, if 10% of the electors request a referendum election on the proposed amendment, an election must take place to permit the electors to approve or disapprove the amendment. Miss Code Ann. § 21-17-9 (1990). After a 1990 census, the City Council determined that new ward lines needed to be drawn because the 1986 ward lines had become malapportioned in violation of the one-person one-vote rule. Those lines were redrawn and the plan was adopted by the City Council. There was no written ordinance evidencing the amendment. The City submitted the plan and the minutes of the December 2, 1991 meeting in which the plan was adopted, to the Justice Department for preclearance under Section 5 of the Voting Rights Act of 1965. No legal descriptions were submitted to the Justice Department. The Justice Department returned a non-objection letter to the City.

The City filed a Complaint seeking declaratory judgment and injunctive relief on December 22, 1995. It sought declaratory judgment that:

> (1) The election districts set forth in the 1986 Charter Amendment were the last properly adopted districts for the City;
>
> (2) The election districts set out in the 1986 amendment to the City Charter no longer comply with applicable law and regulations; and
>
> (3) That future city elections cannot proceed until an election process and election districts can be adopted by a properly adopted amendment to the City Charter utilizing a

process in compliance with Section 21-17-9 of the Mississippi Code of 1972.

The City also asked the circuit court to enter a temporary restraining order and/or a preliminary injunction and/or a permanent injunction against the defendants from conducting elections until such time as an amendment to the City Charter, utilizing the required procedures of Miss. Code Ann. § 21-17-9, could be adopted and implemented. The defendants in this case, and the appellees here, are the three members of the Election Commission and the City Clerk. Thereafter, six citizens and registered voters of Wards 2, 3, 4, 5, and 7 moved to intervene and this motion was granted.

The circuit court held its first hearing on January 12, 1996. At that hearing, the City Clerk of Grenada testified that it is part of her job to know where the ward lines are. The only evidence she could find showing the ward lines was a map that had been published in the newspaper before a special mayoral election in 1994. She attempted to compare the map to the ward lines set out in the City Charter and found that they did not match up. The ward lines in the Charter were based on the amendment made in 1986. Bill Williams, Jr. ran for city councilman in 1992, and testified that he ran based on the ward lines established by the map published in the newspaper. At the conclusion of the hearing, it was decided that all parties would attempt to get the 1992 amendment passed in compliance with state law before the elections so that the judge would not have to enjoin the elections.

Another hearing was held on January 24, 1996. At that hearing, the parties had received all of the information the Justice Department had on the 1992 redistricting. The parties left that hearing intending on attempting to adopt the amendment in compliance with state law and holding the elections as scheduled.

The third and final hearing in this case was held on March 29, 1996. At that hearing, the Mayor testified that the City Council had adopted the new ward lines as set out in 1992,

and had published the amendment in the newspaper. Thereafter, more than 10% of the electors had objected to the amendment, making a special election necessary. Also during the publication time, the Mississippi Supreme Court had affirmed an annexation to the City. At the close of this hearing, the City argued that:

> BY THE COURT: All right. Mr. Mills, do you want to address whether or not I can even do what you asked me to do?
>
> BY MR. MILLS: Your Honor, we submit th you very clearly can. The one thing that important is the City has a districting plan. Since under state law the 1992 redistricting plan was not legally adopted and since we have attempted to legally adopt it and utilizing protection reserved to the people of a city that is special chartered such as the City of Grenada, that proposal has been rejected. We submit that the 1985 plan is the only plan that has been legally adopted. It is without question that that plan is unconstitutionally malapportioned. Going back to the '85 plan, it's not an option. Whether the '92 was attempted to be in place, whether it was used simply begs a question. In special charter municipalities the people have a right to request an election on it. There is no way that that election can occur before April 9 th of this year under state law. So we have an election which would be using ward lines that I don't believe anybody is going to contend have been legally adopted. Once the people requested that, the City Council's hands were tied. There is nothing that can be done. The 1985 malapportioned plan is the plan for the City of Grenada, and we submit that under these circumstances, there is no option but to enjoin the elections or else to proceed under the malapportioned '85 plan.

The trial judge stated that based on this Court's decision in ***In re McMillin***, 642 So.2d 1336 (Miss. 1994), he felt he had no authority to enjoin the election. In his Order, the trial judge found that when the City attempted to amend its Charter and the ward lines set out therein, it did not comply with Miss. Code Ann. § 21-17-9 (1990). He further found that the ward lines established in the City Charter (based on the 1986 amendment) would have to be used for the election even though they were malapportioned. Finally, he found that he had no authority to enjoin the election utilizing the malapportioned ward lines.

After the circuit court refused to enjoin the elections, the City filed an Emergency Motion for Stay with this Court on April 4, 1996. On April 6, 1996, this Court ordered the election stayed pending further order of this Court. The stay was lifted by this Court on June 21, 1996.

The City appeals from the Order of the trial court and assigns as error the following issue for this Court's consideration:

I. DID THE CIRCUIT COURT HAVE AUTHORITY AND JURISDICTION TO ENJOIN AN ILLEGAL ELECTION?

DISCUSSION OF LAW

The City argues that the circuit court had the authority and jurisdiction to enjoin the 1996 elections. It cites this Court's decision in ***Adams County Election Commission v. Sanders***, 586 So. 2d 829 (Miss. 1991) in support of its position. In that case, Charles Sanders filed a Complaint for Declaratory Judgment and Injunctive Relief seeking to enjoin the party primary elections for Adams County Supervisors because there had not been an administrative or judicial preclearance pursuant to § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. ***Sanders***, 586 So.2d at 830. The chancery court entered a preliminary injunction and enjoined the Election Commission from conducting the general and primary elections for supervisors. The chancery court also ordered an election schedule for supervisors based on whether or not the Justice

Department precleared the proposed redistricting plan. Id. The judgment of the chancery court was also submitted to the Justice Department for preclearance. The Election Commission appealed the order of the chancery court and sought to dissolve the preliminary injunction. This Court dissolved the preliminary injunction finding that the harm to the movant did not outweigh the interest of the public in going forward with the scheduled elections. ***Id.*** at 832-833.

In Sanders, this Court said:

> This Court recognizes that state courts have concurrent jurisdiction with the federal courts to decide whether § 5 of the Voting Rights Act applies to contemplated changes in election procedures and further recognizes that state courts have the duty to uphold federal law, jurisdiction and duty which we gladly accept. We also understand that state courts may not actually grant pre-clearance. ***Hathorn v. Lovorn***, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1981) . ***See also Greenville School v. Western Line School***, 575 So.2d 956, 959 (Miss. 1990); ***Harrison County v. City of Gulfport***, 557 So. 2d 780, 788 (Miss. 1990). We recognize that a state court clearly has jurisdiction to decide questions of violation of the one person, one vote standard under the 14th amendment of the United States Constitution as well as under Miss. Const. Art. 3, § 14. Pursuant to Miss. Const. Art. 6 § 147, we do not here today decide which state court, chancery or circuit, should decide such questions, except to note that the plaintiff here requested equitable relief.

Id. at 831. The Court went on to discuss the four factors to be considered when determining whether to grant injunctive relief, and determined that injunctive relief was not appropriate in that case.

The City also cites the United States Supreme Court in ***Clark v. Roemer***, 500 U.S. 646 (1991) , in support of its contention that injunction was a proper remedy in this case. In that case the Supreme Court held that a Louisiana federal district court erred by not enjoining elections for judgeships to which the Attorney General interposed valid objections, and which were not precleared under Section 5. ***Clark***, 500 U.S. at 655 .

The trial court based its ruling on this Court's decision in ***In re McMillin***, 642 So.2d 1336 (Miss. 1994). In that case, the plaintiffs sought an injunction against the Mississippi Democratic Party Executive Committee and the Mississippi Republican Party Executive Committee which would prohibit the holding of the judicial primary election. The Hinds County Chancery Court issued a preliminary injunction enjoining both committees from conducting the elections until preclearance of House Bill 1809 by the Department of Justice under Section 5 was obtained. ***McMillin***, 642 So.2d at 1337. In that case, this Court said:

> Chancery courts in this state do not have the jurisdiction to enjoin elections or to otherwise interfere with political and electoral matters which are not within the traditional reach of equity jurisdiction. ***Howard v. Sheldon***, 151 Miss. 284, 294, 117 So. 839, 839 (1928); ***Goodman v. Rhodes***, 375 So. 2d 991, 993 (Miss. 1979); ***See also Barnes v. McLeod***, 165 Miss. 437, 140 So. 740 (1932); ***Brumfield v. Brock***, 169 Miss. 784, 142 So. 745 (1932); ***Barnes v. Barnett***, 241 Miss. 206, 129 So. 2d 638 (1961); ***Todd v. Smith***, 331 So.2d 920 (Miss. 1976). Moreover, the action taken by the Hinds County Chancery Court in enjoining the judicial primaries constitutes a change in voting standards, practices and procedures also subject to § 5 preclearance or approval. ***See Dougherty County Board of Education v. White***, 439

U.S. 32, 99 S.Ct. 368, 58 L.Ed.2d 269 (1978). As is the case with H.B. 1809, no such preclearance of the injunction issued by the Hinds County Chancery Court was obtained. Voting changes subject to § 5 "will not be effective as law until and unless cleared." ***Connor v. Waller***, 421 U.S. 656, 656, 95 S.Ct. 2003, 2003, 44 L.Ed.2d 486 (1975) . ***See also Clark v. Roemer***, 500 U.S. 646, 652, 111 S.Ct. 2096, 2101, 114 L.Ed.2d 691 (1991) (failure to obtain preclearance leaves the proposed change unenforceable).

It follows that the preliminary injunction at issue, even if within the jurisdiction of the chancery court to grant, cannot be enforced without preclearance. Likewise, H.B. 1809 cannot be enforced without preclearance. Consequently, the statutes currently governing primary judicial elections and setting such elections for Tuesday, June 7, 1994, are the only enforceable provisions regarding said primaries.

Id. at 1339.

Both the ***Sanders*** case and the ***McMillin*** case are distinguishable from the case sub judice. In both those cases, injunction was granted by the lower court because preclearance had not been obtained under Section 5 of the Voting Rights Act of 1965. In the case sub judice, the United States Attorney General returned a non-objection letter to the proposed change submitted by the City. The problem in the case sub judice is that the new wards were not properly adopted according to state law. Miss. Code Ann. § 21-17-9 (1990). The Sanders case implies that where there is a question of violation of the one person one vote constitutional requirement, that state courts have jurisdiction to decide those questions. Furthermore, it does not foreclose the option of an injunction as it goes on to discuss the factors to be considered in granting an injunction.

This Court has long followed the doctrine of non-judicial interference in the election scheme. ***See In re Wilbourn***, 590 So. 2d 1381 (Miss. 1991). However, we have said, "'It [a court] can direct an official or commission to perform its official duty or to perform a ministerial act, but it cannot project itself into the discretionary function of the official or the commission. Stated differently, it can direct action to be taken, but it cannot direct the outcome of the mandated function.'" ***In re Wilbourn,*** 590 So.2d at 1385 (quoting ***Hinds County Democratic Executive Committee v. Muirhead***, 259 So. 2d 692, 695 (Miss. 1972)). We have also said, "[t]hus, a court could, if necessary, compel by mandamus an election commission or executive committee to perform its statutory duty upon its failure to do so, or prohibit it by way of injunction or writ of prohibition from exceeding its statutory authority in some respect; use of an extraordinary writ, however, cannot be extended to actually telling the commission what action to take." ***Id.***

We hold that the Election Commission had an official duty to see to it that the elections in Grenada were carried out in compliance with state law. As such, the circuit court had the power and jurisdiction to enjoin the elections until the City could amend its Charter in compliance with Miss. Code Ann. § 21-17-9 (1990). Thereafter the question for the trial court would have been whether injunction was a proper remedy under Sanders applying the four factors. Therefore, we reverse and remand the case to the Grenada County Circuit Court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

PRATHER, C.J., SULLIVAN, P.J., BANKS, McRAE, ROBERTS, SMITH, MILLS AND WALLER, JJ., CONCUR.

(2)

No. 98-562

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

CITY OF GRENADA, MISSISSIPPI, ET AL.,

Appellants,

v.

LOUISE HUBBARD, ET AL.,

Appellees.

On Appeal From The United States District Court For The Northern District Of Mississippi

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MOTION TO DISMISS OR AFFIRM

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*ROBERT B. MCDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

ELLIS TURNAGE
Post Office Box 216
Cleveland, Mississippi 38732
(601) 843-2811

Counsel for Appellees

**Counsel of Record*

19 pp

QUESTIONS PRESENTED

1. Having failed to preclear under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, a last-minute postponement of the 1996 city council elections, may the appellant city officials prevent remedial elections in 1998 from the latest precleared plan by claiming that they failed to comply with all procedural details of state law when that precleared plan was enacted in 1991, particularly where they have offered the District Court no other remedial proposal for holding elections in the wake of the 1996 postponement?

2. Should the District Court be reversed for granting summary judgment on the question of an appropriate remedy and for failing to hold an evidentiary hearing when the appellants have pointed to no evidence that they would have presented at such a hearing and have failed to explain how any such evidence could have made a difference to the District Court?

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No. 98-562

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CITY OF GRENADA, MISSISSIPPI, ET AL.,
Appellants,

v.

LOUISE HUBBARD, ET AL.,
Appellees.

On Appeal from the
United States District Court
for the Northern District of Mississippi

MOTION TO DISMISS OR AFFIRM

The appellees respectfully request that this appeal be dismissed inasmuch as the appellants filed their jurisdictional statement three days late and omitted a required item from their notice of appeal, or alternatively that the judgment of the three-judge district court for the United States District Court for the Northern District of Mississippi be summarily affirmed inasmuch as the issues raised are so insubstantial as to require no further argument.[1]

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[1] The cover of the appellants' jurisdictional statement incorrectly identifies this case as an appeal from the *Southern* District of Mississippi, when in fact it is from the *Northern* District.

STATEMENT OF THE CASE

In 1996, the city council members of the City of Grenada, Mississippi, postponed their quadrenniel elections by obtaining a last-minute stay from the Supreme Court of Mississippi based upon city officials' own purported failure to follow state law some years earlier when passing the 1991 redistricting plan that was used in the 1992 elections.[2] The defendants readily have admitted that they should have, but never did, submit the postponement of the 1996 elections for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. *See, Hathorn v. Lovorn*, 457 U.S. 255, 266-267 and n. 16 (1982) (election law changes ordered by state courts must be precleared under Section 5). They stipulated in the District Court that Section 5 was violated by their failure to preclear the postponement of the 1996 elections, and they admit at page 10 of their Jurisdictional Statement to this Court that this is a "conceded violation" of Section 5. No elections have occurred since the 1996 postponement, and the voters of Grenada therefore have not had an opportunity to vote for city council members since 1992, six years ago.

In this appeal, the appellants seek to overturn the judgment of the three-judge District Court implementing a remedy for the Section 5 violation and ordering special elections for November 3, 1998, in conjunction with regularly scheduled elections for members of Congress and some state court judges. The appellants already have filed with this Court a motion to stay the District Court's order requiring special elections. In that motion, they raised the same grounds they raise in their jurisdictional statement. On September 25, 1998, this Court denied the motion for stay, No. A-234, and the elections will go forward on

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[2] Not long after the stay was entered, it was lifted, but the damage was done inasmuch as the stay prevented the elections from being held. J.S. App. A-20.

November 3.

These remedial elections, coming over two years after the unprecleared postponement of the 1996 elections, are the culmination of a lengthy process in the District Court. Ever since this litigation was filed in the wake of the 1996 Section 5 violation, the plaintiffs have asked that elections be ordered as soon as possible to fill the void created by the postponed 1996 elections, and also have asked that the elections be held from the ward lines of the 1991 city council plan, which is the last plan to be precleared and the last plan under which Grenada elections were held. On November 21, 1996, Judge L.T. Senter, Jr., of the United States District Court for the Northern District of Mississippi, sitting as a single-judge, declined the plaintiffs' request for the time being because the defendants recently had submitted a new plan for preclearance, "and that [preclearance] process could be concluded before any election might be held under the existing [1991] plan." J.S. App. A-27. In so doing, he noted that he had "strongly urged the city to take the necessary steps towards implementing a new ward plan or otherwise to move this matter toward the goal of conducting city elections," and that his decision was based on the presumption "that defendants will diligently comply with any additional instructions or requests which may be forthcoming from the Justice Department regarding any of the matters now pending before it." J.S. App. A-26, A-27. The new plan that the defendants had submitted for preclearance included a number of heavily-white areas that the City had annexed since 1991 as the black population of the pre-existing city boundaries was growing larger. But the annexations had not been precleared, and under this Court's decision in *Perkins v. Matthews*, 400 U.S. 379 (1971), the annexed areas could not be included in the electorate unless preclearance was obtained.

In September of 1997, concerned about the defendants' lack of progress in following through and obtaining preclearance,

Judge Senter ordered them to file a status report, which they did later that month. In it, they made it clear that -- despite Judge Senter's reliance on their prior submission of a new redistricting plan -- they would no longer stand on that plan or make further efforts to preclear it. Instead they said they were obtaining a special mid-term census and they would then develop and eventually submit for preclearance still another plan. *See*, J.S. App. A-22, A-23.

Noting that the defendants had not diligently complied with their duty to the Court and their duty under Section 5, and declining to permit them to delay city elections any longer, Judge Senter issued an order on November 21, 1997 -- a year after he had allowed the defendants more time to obtain preclearance of a new plan -- requiring special elections on February 3, 1998 from the 1991 plan. As Judge Senter noted, that plan had already "passed preclearance by the Justice Department and was not otherwise challenged as violative of either the Voting Rights Act or the United States Constitution." J.S. App. A-24.

The defendants moved for a stay pending appeal primarily on the ground that a single-judge did not have the power to adjudicate a Section 5 case, and that a three-judge court must be convened for an election to be ordered. On January 28, 1998, the Fifth Circuit granted the stay. On March 2, 1998, the Fifth Circuit remanded the case for the convening of a three-judge court. J.S. App. A-18.[3]

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[3] Judge Senter acted on the principle that once Section 5 liability is stipulated, as here, a single judge can grant relief and there is no need to convene a three-judge court. That position seemed to have some support in the case law. *See, Broussard v. Perez*, 572 F.2d 1113 (5th Cir. 1973). However, the actual text of the statute appears to require a three-judge court as long as a non-frivolous Section 5 claim is presented, and seems to make no exceptions. That apparently is the view taken by the Fifth Circuit in staying Judge Senter's order and remanding this case so a three-judge court could be

The three-judge court was convened, consisting of Judge Rhesa Barksdale of the Fifth Circuit, and Judge Senter and Judge Glen Davidson of the District Court. The plaintiffs then reiterated their request for elections to be held in the wake of the unprecleared 1996 postponement. They filed a summary judgment motion asking that the three-judge court order the elections in November of 1998 when congressional and certain state court judicial elections also will be held. They also asked that the elections be conducted using the ward lines from the 1991 plan.[4]

Once the motion was filed, the defendants requested an additional two weeks to respond beyond what is permitted by the local rules, and the District Court extended the deadline accordingly. But what the defendants did not disclose when requesting the extension, but what eventually became apparent, was that they spent the extended time period preparing a lengthy but belated preclearance submission of still another redistricting plan that had been adopted in late 1997. J.S. App. A-11, A-15. Once they finally did respond in the District Court, they contended that the District Court did not have the authority to order elections under the 1991 plan. But they offered no alternative -- except for more delay. J.S. App. A-16. Having already insured that they will remain in office at least two years beyond the expiration of their normal terms, the city council members wanted the District Court to allow them to stay in

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convened.

[4] In addition to the summary judgment motion, the plaintiffs also sought the same relief through a motion for preliminary injunction, submitted in the event the District Court felt it did not have sufficient time before the November elections to resolve the merits of the case by way of summary judgment. However, the District Court did have time, and it adjudicated the case and ordered the remedy by granting summary judgment.

office even longer without facing the voters.

But the District Court, acting unanimously on July 1, 1998, ordered that elections at last be held in the City of Grenada using the 1991 ward lines, with a candidate qualification deadline of September 8, 1998, an election on November 3, 1998, and a runoff election, if necessary, on November 17, 1998. J.S. App. A-6, A-10.

On July 28, 1998, 28 days after the District Court issued its order, the appellants filed their notice of appeal. Although the District Court's order scheduling special elections was issued on July 1, 1998, the appellants waited until August 31, 1998, to move in the District Court for a stay pending appeal. The District Court denied the motion for a stay the next day, September 1, 1998. The defendants then delayed another two weeks, waiting until September 15, 1998 to file their application for a stay with this Court, seven days after the candidate qualification deadline of September 8, 1998. As previously noted, this Court denied the stay on September 25, 1998, and the elections are going forward.

Also relevant is the fact that, on August 17, 1998, the United States Attorney General denied the defendants' request for preclearance of their latest plan and the annexations that it incorporated. In a lengthy and detailed letter, the Attorney General's designated representative concluded "that there is substantial direct and circumstantial evidence of discriminatory purpose with regard to the proposed changes," adding that "[t]he annexation and redistricting plan, in combination, would significantly reduce minority voting strength." According to the letter, the evidence "indicates that the submitted changes were undertaken with a purpose of stopping the growth of black voting strength in the city and, indeed, of reducing black voting strength back to and below the level that existed in 1990." (The letter is attached as Exhibit 1 to the appellees' response to the

appellants' stay application in this Court, No. A-234, and the quotes are from page 6 of the letter).

At this time, the City is making no effort to preclear any plan for city council elections, and has made no proposal to the District Court or this Court of an alternative plan under which elections can be held to fill the void created by the unprecleared stay of the 1996 elections.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED INASMUCH AS THE JURISDICTIONAL STATEMENT WAS FILED THREE DAYS LATE AND THE NOTICE OF APPEAL DOES NOT COMPLY WITH THE RULES OF THIS COURT.

The appellants filed their notice of appeal on July 28, 1998. Rule 18.3 of the Rules of this Court requires that the jurisdictional statement be filed not more than 60 days after the filing of the notice of appeal. The 60th day from July 28 fell on a Saturday, September 26, making the jurisdictional statement due Monday, September 28. But the appellants did not file it until October 1, 1998, three days after it was due.[5]

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[5] This is part of a consistent pattern of disregard for notions of timeliness displayed by the appellants in this case. The pattern includes, for example, waiting until nearly two months had passed before seeking a District Court stay of the elections ordered for this fall, and then waiting two weeks after the District Court denied the stay to seek a stay from this Court. *See also*, J.S. App. A-16 ("defendants have continued in their pattern of delay even after submission of the proposed plan"); J.S. App. A-10, A-11 ("defendants were continuing in a pattern of 'unnecessary delays that . . . prevented the citizens of the City of Grenada from exercising their right to vote in municipal elections'"); J.S. App. A-10 (referencing a "series of delays in fulfilling Justice Department requests for information"); J.S. App. A-11 and n. 3 (the City's most recent proposed plan -- later denied preclearance -- was

Also, the notice of appeal, reproduced in J.S. App. A-8, does not comply with Rule 18.1 of the Rules of this Court in that it does not "specify the statute or statutes under which the appeal is taken."

The appeal should be dismissed.

II. THE QUESTIONS PRESENTED ARE SO INSUBSTANTIAL AS TO REQUIRE NO FURTHER ARGUMENT, AND THE DISTRICT COURT'S JUDGMENT SHOULD BE SUMMARILY AFFIRMED.

With respect to the merits, the appellants' last argument, contained under heading III in their jurisdictional statement, will be addressed first here because it can be dispatched rather briefly. They complain about the granting of summary judgment without allowing an evidentiary hearing. But neither in this Court nor in the District Court have the appellants explained what evidence they would have presented if an evidentiary hearing were allowed, and what difference that evidence could have made to the District Court's ultimate decision.

Even if they had pointed to evidence which they would submit, the appellants only vaguely allude to District Court findings that they question, and it is clear those findings were not a dispositive part of the District Court's decisionmaking and were not essential to its judgment. The appellants complain about the "trial court's attempt to resolve issues of intent . . . and issues about the reasons for delays in the preclearance process." J.S. 19. But the District Court's comments about the appellants' intent clearly were not dispositive, but instead were followed by

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adopted "after several more delays" but was not submitted for preclearance until two months after it was approved; "[d]efendants have submitted no explanation for the additional two month delay").

a statement that the Court's rejection of the appellants' position was instead based upon this Court's case law. "*In the end*, though, the panel believes that defendants' arguments are misdirected and fail to take into account United States Supreme Court precedent. . . ." J.S. App. A-14 (emphasis added). And while the District Court obviously acted because preclearance had never been obtained of any new plan and because the City had taken no action to schedule elections, the District Court never suggested that the *reasons* for the City's delays would make any difference one way or the other.

As for the arguments under headings I and II in the jurisdictional statement, they are addressed collectively here because they are based upon the same contention. In essence, the appellants, who have conceded the existence of a Section 5 violation, complain about the District Court's choice of a remedy. Because of the equitable discretion afforded district courts in such a situation, the appellants must demonstrate an abuse of that discretion.

In attempting to do so, the appellants claim the preclearance of the 1991 plan should be nullified inasmuch as *they themselves* neglected to inform the United States Attorney General of noncompliance with certain state law procedures. These procedures specifically relate to public notice of the plan for three weeks in a newspaper and submission of the plan to the Governor for his pro forma signature. Because they purportedly did not inform the United States Attorney General of their noncompliance with these state law procedures, the appellants contend that the Attorney General's preclearance should be invalidated as a matter of federal law and that the District Court may not order elections under the 1991 plan.

Although claiming that the District Court should undo the preclearance because of a mistake they made, the appellants have *taken no action* to correct the purported mistake. They

have made no new submission to the Attorney General stating that this particular information was omitted from the prior submission, and they have made no attempt to supplement the prior submission with this information. If they truly were concerned with what they contend is the proper interpretation of Section 5, and if they truly believed the preclearance they previously obtained is subject to nullification, it seems they would have taken steps to correct the situation. But they have not done so. It appears they have not done so because they do not want to face the voters in a special election, and they do not want any further elections conducted from the 1991 ward lines. The appellants should not be allowed to block elections from a particular plan because of a mistake that they say *they made* when they put forth *no* effort to correct the mistake.

Moreover, as the District Court explained, "the validity of a redistricting plan under Section 5 and federal law does not depend on compliance with state law procedures." J.S. App. A-14, *citing, Young v. Fordice*, 117 S.Ct. 1228, 1235 (1997), *City of Lockhart v. United States*, 460 U.S. 125, 132 (1983), and *McDaniel v. Sanchez*, 452 U.S. 130, 152-153 (1981). The District Court said, "[u]nder these cases, defendants ommission did not affect the validity of the preclearance of the 1991 plan by the Justice Department." J.S. App. A-14.

In *Young*, this Court confirmed that a redistricting plan's status under Section 5 and under federal law does not depend on compliance with state law procedures:

> The appellants argue that the simple fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never "in force or effect" [for Section 5 purposes]. We agree. A State, after all, might maintain in effect for many years a plan that technically, or in one respect or another, violated some provision of state law. Cf. *Perkins v. Matthews*, 400 U.S. 379, 394-395, 91

> S.Ct. 431, 440, 27 L.Ed.2d 476 (1971) (deeming ward system "*in fact* 'in force or effect'" and requiring change from wards to at-large elections to be precleared even though ward system was illegal and at-large elections were required under state law) (emphasis in original); *City of Lockhart v. United States*, 460 U.S. 125, 132-133, 103 S.Ct. 998, 1003-1004, 74 L.Ed.2d 863 (1983) (numbered-post election system was "in effect" although it may have been unauthorized by state law).

117 S.Ct. at 1235. As this Court said in *City of Lockhart*, Section 5 deals with the realities of the redistricting lines actually utilized "regardless of what state law might have required." 460 U.S. at 132. And in *McDaniel v. Sanchez*, 452 U.S. 130 (1981), this Court explained:

> The application of [Section 5] . . . is not dependent upon any showing that [a local governmental body] had authority under state law to enact the apportionment plan at issue. . . . The applicability of § 5 to specific remedial plans is a matter of federal law . . . .

Id. at 152-153.

Here, the 1991 plan was precleared by the Attorney General and utilized in the 1992 elections. The validity of that preclearance is not undermined by state law. The postponement of the 1996 elections violated Section 5 because the postponement itself was not precleared. It was the District Court's duty to implement a remedy to correct that Section 5 violation and make up for the long delay in the right of the citizens of the City of Grenada to vote for their city council members. The availability of the precleared 1991 plan to the District Court as a remedy is -- as the Supreme Court said in *McDaniel* -- governed by federal and not state law. Because the plan was precleared under federal law, this District Court

properly ordered it into place for elections to be held in the fall of 1998.[6]

Indeed, if the appellants' position here is accepted, it will provide a blueprint for local governmental officials to perpetuate their stays in office through manipulation of the preclearance process. All they need do is omit some technical state law detail from the redistricting and preclearance process, obtain Section 5 approval, and then years down the road, claim the preclearance is invalid as a matter of federal law and ask that elections be postponed indefinitely. As explained previously, this Court's decisions do not countenance such a bizarre scenario based on state law omissions, and the defendants' argument should not be permitted to prevail here.

Further, even if the appellants are correct and their

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[6] Contrary to the appellants' claims, this case is not effected by this Court's ruling in *United States v. Board of Supervisors of Warren County*, 429 U.S. 642 (1977). In *Warren County*, the three-judge district court ordered an election held under a plan that the Attorney General had specifically rejected under Section 5. The District Court here did not implement a plan specifically rejected under Section 5, but instead one that was actually precleared. Thus *Warren County* is not relevant. Similarly, this case is not effected by *McCain v. Lybrand*, 465 U.S. 236 (1984) or *Clark v. Roemer*, 500 U.S. 646 (1991), although the appellants suggest it is. Certainly, if the District Court were trying to utilize the 1991 plan with, for example, a majority vote requirement that had been adopted in 1988, never submitted, reenacted through the 1991 plan, and yet never identified in the 1991 Section 5 submission, *McCain* might control with respect to this hypothetical majority vote requirement. If the City had added a city council seat in 1988, never submitted it, included it in the 1991 plan, and yet never identified the addition of the new seat in the 1991 submission, *Clark* might control with respect to the uncleared seat. But here, the ward lines that the 1991 plan have been identified to the Attorney General and precleared. No uncleared pre-1991 changes have been reenacted. As illustrated by the principles and cases discussed in the text, the appellants' own state law omissions do not undermine the preclearance or give the appellants an excuse for further postponing the elections in this case.

omission of certain procedural information somehow should lead to the nullification of the overall preclearance of the 1991 plan, the District Court nevertheless would have the power to implement the 1991 ward *lines* as a court-ordered special election remedy, particularly under the unusual circumstances here. In preclearing the 1991 plan, the Attorney General necessarily examined the racial impact of the ward lines and concluded that the City had met its burden under Section 5 of proving they were tainted by neither discriminatory purpose nor discriminatory effect. There is nothing to suggest that this conclusion would be undermined by submission of the omitted procedural information.

In *Upham v. Seamon*, 456 U.S. 37 (1982), this Court held that district courts, when faced with the need to implement a court-ordered plan in the wake of a Section 5 violation, should modify the jurisdiction's unprecleared plan only to the extent necessary to cure the violation. "[T]he district court's modifications of a state plan [should be] limited to those necessary to cure any constitutional or statutory defect." *Id.* at 43. Here, even if the overall 1991 process was somehow effected by the defendants' state law omissions, *the 1991 lines themselves* -- and the Attorney General's determination of the absence of racial discrimination -- were not undermined by the omissions. *Upham* counsels in favor of the District Court accepting the 1991 lines as passed by the 1991 City Council and utilizing them as a special election remedy.[7]

Finally, it is important to note that the appellants have offered no alternative to the remedy imposed by the District Court except to suggest, at pages 19-20 of their jurisdictional

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[7] Certainly, it would not be proper to utilize the lines as part of a court-ordered plan if the Attorney General had concluded they were discriminatory and if no preclearance had been obtained. But that is not the case here.

statement, that "[t]he simplest and most clearly available relief . . . is an injunction against the unprecleared change." But in this case the unprecleared change -- the postponement of the 1996 elections -- has already been implemented, and an injunction against a postponement that occurred two years ago would be an exercise in futility. The remedy is to reschedule the election that never should have been postponed absent preclearance. That is what the District Court has done. Having suggested no alternative remedial plan, the appellants are in no position to claim that the District Court has abused its remedial discretion, and are in no position to obtain a reversal of the District Court's judgment.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the appeal should be dismissed or the judgment of the District Court should be affirmed.

Respectfully Submitted,

*ROBERT B. MCDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

ELLIS TURNAGE
108 North Pearman Street
Post Office Box 216
Cleveland, Mississippi 38732
(601) 843-2811

* Counsel of Record

November 2, 1998